IN THE COURT OF APPEALS OF THE STATE OF ALASKA

DAVID MATTHEW LOPEZ, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12210 Trial Court No. 3AN-12-13084 CR MEMORANDUM OPINION No. 6667 — August 8, 2018

Appeal from the Superior Court, Third Judicial District, Anchorage, Philip R. Volland, Judge.

Appearances: Josie Garton, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Ann B. Black, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, and Allard, Judge.

Judge MANNHEIMER.

David Matthew Lopez was convicted of first-degree murder for shooting his wife Sara. He now appeals his conviction, arguing that the trial judge committed error by not allowing Lopez's attorney to introduce the text of Sara's personal journal from the three years preceding her death, and by not instructing the jury on the defense

of heat of passion. For the reasons explained in this opinion, we reject both of these claims of error.

Lopez was also convicted of resisting arrest, based on evidence that, after Lopez was arrested and brought to the police station, he tried to grab one of the officers' sidearms, and he begged the officers to shoot him. Lopez argues that his arrest was already over when this incident occurred, and thus his actions did not constitute the crime of "resisting arrest".

This was not the argument that Lopez's attorney made in the trial court. Indeed, Lopez's attorney argued exactly the opposite: he contended that Lopez had *not yet been arrested* when he tried to grab the officer's sidearm. Thus, the issue of when Lopez's arrest *ended* was never litigated in the trial court. This means that Lopez must show plain error. And as we explain in this opinion, Lopez's briefing of this issue is insufficient to preserve this claim of plain error.

Lopez was also convicted of terroristic threatening for telephoning the Office of Children's Services and threatening to shoot the case worker who was handling his child's case. As defined in AS 11.56.810(a), a person commits terroristic threatening only if the person knowingly makes a *false* report that a circumstance dangerous to human life is about to exist. Lopez contends that his jury was mis-instructed regarding the State's burden to prove the falsity of his threat to the Office of Children's Services. We conclude that the jury instructions adequately informed the jurors that the State had to prove the falsity of Lopez's threat.

Finally, Lopez contends that his sentence — a composite 63 years' imprisonment — is excessive. We conclude that this sentence is not clearly mistaken.

Underlying facts

In December 2012, David Lopez and his wife Sara were living in Anchorage with their two-year-old daughter, K.L. Lopez was in the military, and he had recently returned from a deployment to Afghanistan.

Late in the morning of December 12th, Sara brought K.L. to the emergency room at Joint Base Elmendorf-Richardson because she was concerned about certain marks on the child's face. The doctor who examined K.L. concluded that the child had suffered an impact injury from a slap or similar blow. Suspecting child abuse, the doctor contacted the authorities.

An Anchorage police officer was dispatched to the hospital. After interviewing Sara, this officer contacted the Office of Children's Services. A Children's Services case worker came to the hospital and spoke to the attending physician. The case worker agreed with the doctor's assessment that K.L.'s injuries were suspicious. After consulting his supervisor at Children's Services, the case worker decided to take emergency custody of K.L. It was now 6:30 in the evening.

The case worker explained to Sara that this custody was only temporary: that the case worker was required to file a petition within 24 hours, that a court hearing would be held the following day, and that the Office of Children's Services would be working on a "safety plan" for K.L.

At this point, Sara had been at the hospital for approximately seven hours. During this time, she had been unsuccessful in her efforts to contact Lopez.

When Sara finally returned home (without K.L.), Lopez was there, and he had been drinking heavily. When Lopez found out that Children's Services had taken emergency custody of K.L., he became irate. He telephoned the case worker and

repeatedly threatened to kill him — telling the case worker that he intended to come to the Children's Services office before the court hearing. This was around 7:00 p.m.

About 30 minutes later, Lopez called 911 to report that his wife Sara was dead. Toward the beginning of the 911 call, Lopez told the dispatcher that he had shot Sara. Then Lopez equivocated — telling the dispatcher that he *thought* he had shot Sara. When the 911 dispatcher asked Lopez why he thought that he had shot his wife, Lopez replied, "Because she took my daughter to the ER and had her taken away."

Soon thereafter, Lopez changed his story — telling the dispatcher that "it was an accident". But then Lopez repeated that he shot Sara because Sara "had my daughter taken away."

When the 911 dispatcher asked Lopez to describe himself, Lopez hung up. The dispatcher immediately called back, but Lopez apparently did not answer the phone.

Police officers were immediately dispatched to the Lopezes' apartment. When the officers arrived, they found that Sara had been shot in the left side of her head. (Sara was right-handed.) Sara was still alive when the officers entered the apartment, but she died about two minutes later.

Lopez was taken into custody, and he was interviewed at the police station about three and a half hours after the shooting. During this interview, Lopez changed his story again. Lopez no longer claimed that he had shot his wife, nor did he claim that the shooting was an accident. Instead, Lopez now told the police that Sara had committed suicide — that she "killed herself in front of [him]".

More specifically, Lopez told the police that Sara had gone into the bedroom while Lopez was on the phone with the Office of Children's Services (threatening to kill the case worker). Lopez claimed that, after he ended this phone call, Sara came out of the bedroom, walked into the kitchen, retrieved a handgun from the

kitchen cupboard, and then shot herself — using her left hand — before Lopez could stop her.

Lopez told the police that he had hugged Sara after the shooting, and that he had put his hand to the left side of her head and had felt her blood flowing from the wound. Lopez also claimed that he had done nothing to clean up before the police arrived. But when the police arrived at the apartment, Lopez was not wearing a shirt, and there was no blood on Lopez's arms or his hands, except for a small amount on his cuticles.

Lopez was indicted under alternative theories of first- and second-degree murder. He was also charged with terroristic threatening for calling the Children's Services case worker and threatening to kill him.

In addition, Lopez was charged with resisting arrest for an incident that occurred after he was taken into custody and brought to the police station:

Upon Lopez's arrival at the station, an officer began escorting him to an interview room. Lopez was in handcuffs. While they were walking to the interview room, Lopez told the officer, "Please kill me." The officer responded that he could not do that. Then, despite the impediment of his handcuffs, Lopez reached for the officer's sidearm. The officer was able to shove Lopez away and to summon assistance.

(With the help of other officers, Lopez was successfully brought to the interview room. Lopez continued to ask the officers to kill him, and he told them, "I killed my wife." However, as we have already explained, Lopez gave a different version of events during the ensuing interview — telling the officers that his wife had committed suicide.)

Lopez's contention that the trial judge should have allowed him to introduce the text of Sara's journal

Following Sara's death, her sister went to the Lopez apartment to gather up the family's possessions and deliver them to Children's Services, to hold in safekeeping for K.L. Among these items was the journal that Sara kept sporadically during the three years preceding her death. [1]

Sara's journal entries reflect that she had low self-esteem. (She worried about her physical appearance and her self-image.) Sara also wrote about her love for Lopez, and her happiness that Lopez loved her in return. And she described the anxiety and loneliness she felt when Lopez was deployed to Afghanistan. In her last entry (dated September 12, 2012 — three months before her death), Sara wrote about her joy that Lopez was soon to return from his deployment.

At Lopez's trial, his defense attorney asked the judge to let him introduce the entire text of these journal entries. The defense attorney argued that Sara's journal entries were relevant to prove that she was severely depressed and suicidal — thus supporting the defense contention that Sara took her own life.

As a technical matter, the defense attorney offered the journal entries as "character evidence" under Alaska Evidence Rule 404(a)(2). This rule authorizes the admission of "evidence of a relevant trait of character of a [crime] victim [when] offered by an accused".

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[1] Sara's first journal entry was dated December 29, 2009 — three years before her death. Sara sporadically added entries to the journal over the next nine months (through September 2010), and she then stopped writing for more than a year. Sara's next entry was dated in October 2011. She added three entries in February 2012, and one more in March 2012. Then, after a hiatus of several months, she added a series of entries in July and August 2012. Sara's last entry was dated September 12, 2012 — three months before her death.

The trial judge concluded that, despite the defense attorney's characterization of the evidence, Sara's journal entries did not constitute evidence of her "character". Although we do not have to definitively resolve this issue, we agree with the trial judge that there is reason to question whether the journal entries constitute character evidence.

Evidence Rule 404 itself does not define the term "character", but this subject is discussed in the Commentary to Evidence Rule 406, in the context of differentiating "character" from "habit". According to this commentary, "character is a generalized description of one's disposition, or of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness". *See Hunter v. State*, 307 P.3d 8, 16 (Alaska App. 2013).

Under this definition, it is not obvious that a person's alleged depression, or their alleged suicidal tendencies, would qualify as their "character".

See State v. Stanley, 37 P.3d 85, 92 (N.M. 2001) (holding that evidence of a person's suicidal tendencies is not "character" evidence for purposes of New Mexico's equivalent to our Evidence Rule 404). *See also Lewis v. St. John Hospital*, unpublished, 2005 WL 1490023 at *6 (Mich. App. 2005) (indicating that evidence of a person's mental illness was not "character" evidence, but holding that it was nonetheless admissible because it was relevant to the person's state of mind at the time of the events being litigated). *But see State v. Connor*, 161 P.3d 596, 603 n. 4 (Ariz. App. 2007) ("Behavior that results from a mental illness when appropriate medication is not taken would qualify as 'a pertinent trait of character offered by the accused,' and thus [be] admissible pursuant to Arizona Rule of Evidence 404(a)(2).").

But even if we assume that a person's depression or their suicidal tendencies qualified as "character" for purposes of Evidence Rule 404(a)(2), our evidence rules prohibit the proponent of character evidence from proving a person's character through specific instances of the person's behavior (such as journal entries).

Evidence Rule 405 declares that when character evidence is admissible under Rule 404(a), the proof of that character is confined to reputation and opinion evidence — not evidence of "relevant specific instances of conduct".

(Rule 405 makes an exception for cases where the trait of character is a necessary element of a claim or a defense. But this situation is quite rare; the two primary examples are lawsuits for slander and negligent entrustment.)

See our lengthy discussion of these points of evidence law in *Allen v. State*, 945 P.2d 1233, 1239-1243 (Alaska App. 1997).

We thus conclude that evidence of Sara's journal entries was not admissible as character evidence under Rule 404(a)(2).

However, the journal entries (or, at least, the more recent ones) were potentially admissible as evidence bearing on Sara's state of mind at or near the time of her death. See, for example, *Keith v. State*, 612 P.2d 977, 983-84 (Alaska 1980), a murder prosecution where our supreme court held that the victim's journal entries should have been admitted in support of the defendant's claim that the victim was a violent person who attacked him for no reason, and that he (the defendant) acted in self-defense.

(We note that the *Keith* decision suggests that the victim's journal was also admissible as character evidence. But the trial in *Keith* took place before Alaska's current Rules of Evidence took effect on August 1, 1979.[2])

In the present appeal, Lopez argues that the *Keith* decision shows that the trial judge should have allowed him to introduce the text of Sara's journal entries. But the decision in *Keith* hinged on the premise that there was, in fact, a logical nexus between the content of the journal entries and the thing that the defendant was trying to prove.

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[2] *See* Alaska Supreme Court Order No. 364, effective August 1, 1979.

In *Keith*, the victim's journal entries were held admissible because they did, in fact, reasonably indicate that the victim was a violent person, and that he was therefore more likely to have acted aggressively toward the defendant. But without this logical nexus, the decision would have been different — as shown by this Court's decisions in *Page v. State*,[3] *Stevens v. State*,[4] and *Heath v. State*.[5]

In *Page*, for example, the defendant was charged with murder, and he asserted that he acted in self-defense when the victim attempted to rape him. To support this claim of attempted rape and self-defense, Page wished to introduce evidence that the victim had several pornographic books and magazines in his home. Page's attorney argued that someone who was interested in pornography was more likely to commit rape (in his case, homosexual rape).

The trial judge refused to take judicial notice that there was a connection between a person's possession of pornography and their willingness to commit rape, and the judge found that Page's attorney had otherwise failed to establish this nexus. The judge told the defense attorney:

> All you need is one witness ... who will say that the fact that [the victim] had these books in his possession ... increases the probability that he ... would have engaged in a homosexual act with Mr. Page. That's all you need, and you can put it all in. Just increases the probability; it's the only standard I'm giving you. Doesn't even have to be more

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[3] 657 P.2d 850, 852-53 (Alaska App. 1983).

[4] 748 P.2d 771, 774-75 (Alaska App. 1988).

[5] 849 P.2d 786, 788 (Alaska App. 1993).

> probable than not. ... If you've got an expert that says that, any psychologist, psychiatrist who comes in and gives that opinion, you're home free. If you haven't got that, forget it.

Page, 657 P.2d at 852.

On appeal, this Court upheld the trial judge's ruling. In reaching this conclusion, we relied on the discussion of this issue contained in a prominent work on evidence law: C. Wright & K. Graham, *Federal Practice and Procedure: Evidence*, § 5165, at 48-65 (1978).

Professors Wright and Graham point out that, normally, the relevance of evidence — *i.e.*, the nexus between proffered evidence and the proposition that the proponent of the evidence is trying to prove — will rest on a principle of general knowledge, a connection that the trial judge can take judicial notice of.

But the authors caution that if the nexus between the proffered evidence and the proposition to be proved does *not* rest on general knowledge (*i.e.*, if it is not something that the trial judge can reasonably assume without proof), then the proponent of the evidence must affirmatively establish this logical connection in order to show that the evidence is indeed relevant. *Page*, 657 P.2d at 852-53.

In *Page*, this Court agreed with the trial judge that the connection between possession of pornography and propensity to commit violent sexual assault was not self-evident, and that the trial judge could therefore reasonably require the defense attorney to introduce at least some evidence that this nexus existed. *Ibid.* In reaching this conclusion, we distinguished the supreme court's holding in *Keith*:

> *Keith v. State*, 612 P.2d 977, 983-84 (Alaska 1980), is not inconsistent with [our conclusion]. In *Keith*, a murder prosecution[,] the court held that the victim's journal supported an inference that he was a violent person. This in turn supported the defendant's theory that the victim was the

> aggressor and [that] the defendant killed him in self-defense. The nexus between violence and aggression may be a matter of common knowledge. The nexus between pornographic literature and homosexual rape is not.

Page, 657 P.2d at 853 n. 1.

We applied this same principle in *Stevens v. State*, 748 P.2d at 774-75, and *Heath v. State*, 849 P.2d at 788. In both cases, we held that evidence was not admissible when there was no apparent logical nexus between the offered evidence and the proposition for which it was offered.

In Lopez's case, the trial judge reached this same conclusion — that there was no apparent logical nexus between Sara's journal entries and the defense proposition that she was suicidal. Although the trial judge framed his comments in terms of Evidence Rule 403 (*i.e.*, a weighing of probative value versus the potential for unfair prejudice), the gist of the judge's analysis was that Lopez's attorney had failed to establish a reasonable logical nexus that would make the evidence relevant under Evidence Rule 401:

> *The Court*: Even assuming that the journal entries are character evidence in whole or in part, they suffer from [the] flaw that ... there is not a sufficient expert connection between the compilation of impressions written by Ms. Lopez in her journal and the alleged subsequent conduct that the defendant wishes the jury to conclude that she engaged in [*i.e.*, Lopez's assertion that Sara committed suicide].
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> I [want to ensure] ... that the jury not engage in improper speculation[.] ... [And] allowing the journal entries [into evidence] would allow essentially pure speculation ... that these entries had some meaning [on the question of whether Sara committed suicide]. ... [It would] allow the attorneys to [play the part of] experts ... [by] argu[ing] the

> meaning, or lack thereof, of the statements, without any evidence to support such suggestions.

We have reviewed the journal entries, and we agree with the trial judge's conclusion. There is no obvious connection between Sara's journal entries and her willingness or propensity to commit suicide. And when this matter was discussed in the trial court, Lopez's attorney conceded that he had no psychiatric expert who would be able to assert that Sara's journal entries were a reasonable indication that she would take her own life.

This being so, the trial judge properly denied the defense attorney's request to introduce the text of the journal.

Lopez's contention that the trial judge should have instructed the jury on heat of passion

Toward the end of Lopez's trial, Lopez told the judge that he did not intend to take the stand; that is, Lopez chose not to offer testimony in support of the defense theory that Sara had committed suicide. Then Lopez's attorney asked the judge to instruct the jury on the defense of heat of passion.

(If Lopez had acted in the heat of passion, this would reduce his offense to manslaughter.)

The defense attorney conceded that the defense theory of the case was that Sara shot herself — not that Lopez shot her in the heat of passion. But the defense attorney pointed out that, at one point during Lopez's conversation with the 911 dispatcher, Lopez stated that he shot Sara "because she took [their] daughter to the ER and had her taken away." Based on Lopez's statement during the 911 call, the defense attorney argued that the jury might reasonably find that Lopez acted in the heat of

passion — a passion brought on by Sara's act of taking their child to the emergency room, which in turn led to the child protection authorities taking custody of the child.

The trial judge ruled that, even assuming that Lopez was provoked to kill Sara because she took their injured child to the hospital, this could not (as a matter of law) constitute the "serious provocation" required to support a heat of passion defense under AS 11.41.115(a). The judge concluded that Sara's act of taking the child to the hospital could not constitute "serious provocation", both because Sara's act was lawful and also because Sara had a legal obligation to take care of her child.

As soon as the judge announced this ruling, Lopez's attorney offered a new theory as to why Sara had purportedly provoked Lopez. The defense attorney now contended that Lopez was provoked to kill Sara because Lopez reasonably believed that the sole reason their child needed medical care was that Sara had assaulted the child.

The judge did not respond to this new argument, other than to say, "All right. Let's call the jurors in [to hear the parties' summations]."

On appeal, Lopez abandons his argument that the "serious provocation" was Sara's act of taking their daughter to the emergency room. Instead, Lopez pursues the alternative argument that his trial attorney raised for the first time after the trial judge issued his ruling on heat of passion — the argument that Sara provoked Lopez by assaulting their child. Here is that argument, as stated in Lopez's opening brief to this Court:

> Viewing the evidence in the light most favorable to [Lopez], Sara caused K.L. to be taken away by hitting her. ... It was not Sara's act of taking K.L. to the hospital that was the serious provocation, but [rather] her conduct in injuring K.L. and creating grounds for [the Office of Children's Services'] emergency removal [of K.L. from the Lopez home]. This conduct, in combination with Sara's return to the apartment without K.L. ... , was serious provocation.

We reject this argument because it has no basis in the record. We acknowledge that a defendant who seeks a jury instruction on heat of passion need only present "some evidence" of serious provocation — *i.e.*, evidence which, if viewed in the light most favorable to the defendant's claim, is sufficient to reasonably support this element of the heat of passion defense. [6]

But there is no evidence in the record to support a finding that Sara Lopez assaulted her daughter. The origin of K.L.'s injuries went unexplained.

When Lopez spoke to the 911 dispatcher, he did not assert that Sara had assaulted their child — even though the dispatcher asked Lopez directly why he had shot Sara. Instead, as we have explained, Lopez told the dispatcher that he shot Sara because "she took [their] daughter to the ER and had her taken away."

The question of whether K.L. was actually assaulted was not litigated at Lopez's trial. The evidence established only that an emergency room doctor and a Children's Services case worker both concluded that K.L.'s injuries were *likely* the product of an assault. There was no proof that K.L. actually *was* assaulted, nor was there any evidence as to who might have perpetrated this assault. It might have been Sara — although the fact that Sara took the child to the hospital could be viewed as tending to disprove this possibility. It might also have been Lopez. Or it might have been some third person.

Given the lack of evidence, any conclusion on this score would be pure speculation. We therefore conclude that the evidence at Lopez's trial did not constitute "some evidence" of serious provocation — and we accordingly uphold the trial judge's refusal to instruct the jury on heat of passion.

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[6] AS 11.81.900(b)(19)(A); *Howell v. State*, 917 P.2d 1202, 1207 (Alaska App. 1996).

Lopez's argument that his act of trying to seize the officer's firearm did not constitute the crime of resisting arrest

Besides murder, Lopez was also convicted of resisting arrest for attempting to grab the police officer's sidearm as he was being escorted to the interview room at the police station.

As defined in AS 11.56.700(a), the crime of resisting arrest occurs if a person knows that a police officer is "making an arrest", and if that person uses force, or engages in other conduct that creates a substantial risk of physical injury to any person, for the purpose either of resisting their own arrest or of interfering with the arrest of someone else.

On appeal, Lopez argues that his arrest had ended by the time he tried to grab the officer's firearm — and, since the arrest was already complete, his actions could not constitute the crime of "resisting arrest".

But this is not the argument that Lopez's attorney made in the trial court. Instead, Lopez's attorney argued precisely the opposite: the defense attorney contended that Lopez was not guilty of resisting arrest because, when Lopez tried to gain control of the officer's gun, *he was not yet under arrest*. In the alternative, Lopez's trial attorney argued that even if Lopez had technically been arrested at that point, Lopez did not *know* that he had been arrested, so he could not have acted with the intent required by the resisting arrest statute (*i.e.*, the intent of resisting his own arrest).

Lopez abandons these arguments on appeal in favor of the claim that, as a matter of law, his arrest was already over when he tried to grab the officer's sidearm. This was an argument that the trial jurors came up with.

During their deliberations, the jurors sent a note to the trial judge asking him to clarify the law on the question of when Lopez's arrest occurred. From the

questions posed in the jury's note, it is clear that the jurors were having difficulty with the issue of whether Lopez could be said to be "resisting arrest" if he had already been taken into custody and had been brought inside the station house in handcuffs. The jurors asked the judge to explain (1) whether "being arrested" was a single moment in time or, instead, a continuing transaction, and (2) whether resisting the police "while in custody" was legally the same thing as "resisting arrest".

The judge ultimately answered the jury's questions by telling the jurors that "a person remains under arrest so long as the person is being held in custody to answer for the commission of a crime."

(Taken literally, the judge's answer meant that so long as an arrested person has not been released on bail, that person could commit the crime of "resisting arrest" by using force against an officer at any time up to the moment the person was either convicted or exonerated of the crime charged against them. However, given the evidence presented at Lopez's trial, and given the arguments of the attorneys, it was clear that Lopez was charged with resisting arrest based on his act of trying to grab the officer's sidearm while he was being escorted to the interview room at the police station.)

After receiving the judge's answer to their question, the jury convicted Lopez of resisting arrest.

On appeal, Lopez argues that the resisting arrest statute should be interpreted so that the crime is committed only if the defendant uses force while the police are "[in] the process of taking [a person] into custody" — and that the crime of resisting arrest does not apply to situations where an arrestee uses force to impede the police *after* the arrestee has been taken into custody (or has voluntarily submitted to custody).

Because this argument was never presented to the trial court, the trial court held no evidentiary hearing on this matter, nor did the trial judge ever issue a ruling on this issue. Lopez must therefore show plain error.

In this context, "plain error" means that Lopez must show that, under any possible interpretation of the trial record, the record affirmatively establishes that Lopez's arrest had already ended when he reached for the officer's firearm.

As Lopez recognizes, this Court held in *Fallon v. State*, 221 P.3d 1016, 1019-1020 (Alaska App. 2010), that the act of arresting a person is a "process" rather than an event that occurs at a fixed moment in time. Even so, Lopez contends that a person's arrest must certainly be completed by the time the arrestee is transported to a police station, courthouse, or jail. Thus, according to Lopez, he could not possibly have been "resisting arrest" when he tried to seize control of the officer's firearm.

(Lopez characterizes this argument as a claim that there was "insufficient evidence" to support his conviction. But properly understood, Lopez is raising a statutory interpretation claim, not a sufficiency of evidence claim. [7])

In his opening brief to this Court, Lopez treats his interpretation of "arrest" as the only obvious conclusion to be drawn from this Court's decision in *Fallon* and from the definition of "arrest" codified in AS 12.25.160. [8] But *Fallon* and AS 12.25.160 do not directly answer the question of when an arrest should be considered "complete" for purposes of the resisting arrest statute.

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[7] *See Collins v. State*, 977 P.2d 741, 751-52 (Alaska App. 1999); *Steve v. State*, 875 P.2d 110, 114-15 (Alaska App. 1994); *State v. Martushev*, 846 P.2d 144, 147-48 (Alaska App. 1993).

[8] This statute declares that an "arrest" is "the taking of a person into custody in order that the person may be held to answer for the commission of a crime."

Lopez's opening brief cites no legal authority directly addressing his contention that an arrest is necessarily complete by the time the arrestee is taken to a police station. But as the State points out in its brief, there are several court decisions from other states which take a position directly contrary to Lopez's position. These courts hold that the crime of resisting arrest can cover forcible resistance to the police — or to corrections officers — at any time until the defendant is booked and properly confined in a jail or other holding facility. [9]

In his reply brief, Lopez responds by citing one case that supports his position that an arrest is complete when the arrestee is transported to a police station. [10]

We have conducted our own independent research, and we have found several additional cases addressing the question of when an arrest becomes complete, so that later acts of resistance do not constitute "resisting arrest". [11] The results reached by these courts vary according to the differing wording of their resisting arrest statutes, and also according to the courts' weighing of the policies underlying the laws that prohibit forcible resistance to an arrest.

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[9] *See State v. Mallett*, 542 S.W.2d 584, 587 (Mo. App. 1976); *State v. Leak*, 181 S.E.2d 224, 226 (N.C. App. 1971); *State v. Bolden*, 801 P.2d 863, 864 (Or. App. 1990); *State v. Dowd*, 411 S.E.2d 428, 429 (S.C. 1991); *Pope v. State*, 528 S.W.2d 54, 58 (Tenn. Crim. App. 1975).

[10] *Commonwealth v. Grandison*, 741 N.E.2d 25, 34-35 (Mass. 2001).

[11] *See State v. Mitchell*, 62 P.3d 616, 618-19 (Ariz. App. 2003); *Perry v. State*, 968 So.2d 70, 75-76 (Fla. App. 2007); *Perdue v. Commonwealth*, 411 S.W.3d 786, 791-93 (Ky. App. 2013); *Commonwealth v. Knight*, 916 N.E.2d 1011, 1014 (Mass. App. 2009); *Commonwealth v. Katykhin*, 794 N.E.2d 1291, 1292-93 (Mass. App. 2003); *State v. Ajak*, 543 S.W.3d 43, 46-48 (Mo. 2018); *State v. Lindsey*, 973 A.2d 314, 316-18 (N.H. 2009); *State v. Bay*, 721 N.E.2d 421, 422-23 (Ohio App. 1998); *City of Columbus v. Calhoun*, unpublished, 1979 WL 209411 at *1-2 (Ohio App. 1979); *In re M.C.L.*, 110 S.W.3d 591, 596-97 (Tex. App. 2003); *Lewis v. State*, 30 S.W.3d 510, 512-13 (Tex. App. 2000).

These many court decisions are best summarized by saying that there is no ready answer to the question of when an arrest should be deemed completed for purposes of a resisting arrest statute. Instead, there is a substantial split in authority as to when an arrest should be considered "over" or "completed" for purposes of a resisting arrest statute. And because this is a complicated issue, with no ready answer, we conclude that Lopez's briefing of this issue — his citation of a single case from another state in his reply brief — is insufficient to preserve this issue for appeal. [12]

On this basis, we reject Lopez's claim of plain error.

Lopez's contention that the trial judge mis-instructed the jury on the elements of terroristic threatening

As we explained earlier, Lopez was convicted of terroristic threatening for telephoning the Children's Services case worker and threatening to kill him.

A person commits terroristic threatening under AS 11.56.810(a) if the person knowingly makes a *false* report that a circumstance dangerous to human life exists or is about to exist. Lopez does not dispute that a threat to kill someone falls within this statute. But Lopez points out that, under the terms of the statute, the State must prove that the threat was false.

During jury deliberations, the jury sent a note to the judge asking whether the State was required to prove that Lopez's threat was false. Specifically, the jury asked two questions: (1) whether the offense of terroristic threatening was proved "if we believe [that] the defendant intended to carry out the threat at the time of the [phone]

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[12] *See McCormick v. Anchorage*, 999 P.2d 155, 162 (Alaska App. 2000) ("Given the complexity of this issue, we find that [the appellant's] briefing is inadequate to allow meaningful review. Accordingly, we deem the issue waived.").

call?" And (2) whether "all three [elements] of the charge [are proved] if we are not sure the report was *false*?" (Emphasis in the original jury note.)

In response, the judge told the jury that the statute required the State to prove "knowing falsity" beyond a reasonable doubt. In specific response to the jury's second question (*i.e.*, whether the charge was proved if the jurors were not sure whether the threat was false), the judge's answer was: "No. The state must prove the elements of [the] charged offense beyond a reasonable doubt."

On appeal, Lopez argues that the judge's response to the jury was erroneous because, after the judge explained all of the foregoing to the jury, the judge added the statement, "If a person acts intentionally, the person also acts knowingly."

The judge's statement was an imprecise paraphrasing of AS 11.81.610(c), a statute which declares that when the law requires the State to prove that a defendant acted with the culpable mental state of "knowingly" with respect to an element of a crime, that element is satisfied if the State proves that the defendant acted with the culpable mental state of "intentionally" with respect to that element.

The jury had already been instructed on this principle. Jury Instruction No. 24 stated, in pertinent part: "Of course, if a person acts 'intentionally,' then that person also acts 'knowingly.'"

It is unclear why the judge believed that he needed to remind the jury of Instruction No. 24 when he answered the jury's question about the elements of terroristic threatening. But we reject Lopez's argument that this reminder somehow undermined the correctness of everything else the judge said in his response to the jury's questions.

The judge clearly told the jury that they had to find, beyond a reasonable doubt, that Lopez's threat to kill the case worker was false. We therefore uphold Lopez's conviction of this crime.

Lopez's attack on his sentence

Lopez faced a sentence of 20 to 99 years' imprisonment for murdering his wife Sara.[13] The superior court sentenced Lopez to 62 years' imprisonment for this crime. The court added a consecutive sentence of 1 year to serve for Lopez's false threat to kill the Children's Services case worker. The court gave little weight to Lopez's act of resisting arrest: Lopez received a concurrent sentence of 15 days for this offense.

Lopez argues that his composite sentence of 63 years to serve is clearly mistaken. He contends that the sentencing judge improperly discounted the evidence that Lopez suffered from post-traumatic stress disorder, both as a result of childhood experiences and also as a result of his deployment to Afghanistan (a combat theater).

The record shows that the sentencing judge considered this evidence, but that he ultimately concluded that it did not significantly mitigate Lopez's offense. First, the judge concluded that Lopez did not shoot his wife in the throes of a post-traumatic stress reaction. Rather, the judge found that Lopez was an alcoholic who "had a lot of rage going back for a long time, and very little of that had to do with Afghanistan."

The judge acknowledged that Lopez had suffered childhood trauma, and that this trauma affected him as an adult, but the judge concluded that this factor was not a primary sentencing consideration in Lopez's case. The judge noted that many defendants commit spousal assault when they lose control of their emotions in a domestic situation, and the judge concluded that Lopez's case was "not a whole lot different" from these cases.

Second, the sentencing judge concluded that Lopez's murder of his wife was an egregious instance of domestic violence — an act where Lopez placed a gun to the side of his wife's head and deliberately pulled the trigger.

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[13] Former AS 12.55.125(a) (the 2012 version).

The judge concluded that, under these facts, the sentencing goal of community condemnation was paramount, with the next priority being general deterrence (*i.e.*, deterrence of others).

The judge acknowledged that Lopez was a youthful offender (in his twenties), and that Lopez had "good character and capability". But the judge also concluded that Lopez had "a real hair-trigger", and that Lopez would remain "explosive" and dangerous until he had been successfully treated for alcohol dependency, depression, and anger.

The sentencing judge's findings are supported by the record, and his weighing of the sentencing criteria is not clearly mistaken. We therefore uphold Lopez's sentence. [14]

Conclusion

The judgement of the superior court is AFFIRMED.

[14] *See McClain v. State*, 519 P.2d 811, 813-14 (Alaska 1974) (an appellate court is to affirm a sentencing decision unless the decision is clearly mistaken).